

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,)
) File No. 18-CR-67
) (WMW)
Plaintiff,)
)
vs.) St. Paul, Minnesota
) October 18, 2018
Terry J. Albury,) 11:16 a.m.
)
Defendant.)

BEFORE THE HONORABLE WILHELMINA M. WRIGHT
UNITED STATES DISTRICT COURT JUDGE

(SENTENCING HEARING)

Proceedings reported by shorthand reporter; transcript
produced by computer.

APPEARANCES

For the Plaintiff:

Department of Justice
National Security Division
PATRICK T. MURPHY, ESQ.
DAVID C. RECKER, ESQ.
950 Pennsylvania Ave
Washington, D.C. 20530

United States Attorney's Office
DANYA E. ATIYEH, ESQ.
2100 Jamieson Avenue
Alexandria, Virginia 22314

For the Defendant:

Law Offices of Joshua L. Dratel, PC
JOSHUA L. DRATEL, ESQ.
Suite 1412
29 Broadway
New York, New York 10006

Murray Law, LLC
JANEANNE MURRAY, ESQ.
Suite 5010
310 South Fourth Avenue
Minneapolis, Minnesota 55415

Court Reporter:

LORI A. SIMPSON, RMR-CRR
Suite 146
316 North Robert Street
St. Paul, Minnesota 55101

P R O C E E D I N G S

IN OPEN COURT

(Defendant present)

COURTROOM DEPUTY: The matter before the Court is 18-CR-67, United States of America vs. Terry J. Albury.

Will counsel please stand and note your appearance for the record.

MR. MURPHY: Your Honor, Patrick Murphy for the United States. With me today are David Recker from the National Security Division and Dana Atiyeh from -- an AUSA from the Eastern District of Virginia.

THE COURT: Thank you. Good morning, Mr. Murphy. And good morning, Mr. Recker and Ms. Atiyeh.

MR. DRATEL: Good morning, Your Honor. Joshua Dratel with JaneAnne Murray for Mr. Albury, who is seated between us.

THE COURT: Thank you. Good morning, Mr. Dratel, as well as Mr. Albury and Ms. Murray.

So we are here for a sentencing in this matter. Mr. Albury previously pleaded guilty to unauthorized disclosure of national defense information and that's a violation of Title 18, United States Code, Section 793(e).

Mr. Murphy, have you and your co-counsel received a copy of the Presentence Investigation Report and the addendum?

1 MR. DRATEL: Yes, Your Honor.

2 THE COURT: Okay. And have you and your
3 co-counsel and Mr. Albury received a copy of the Presentence
4 Investigation Report, Mr. Murphy [sic]?

5 MR. DRATEL: Yes, we have all received it. Thank
6 you.

7 THE COURT: And read and discussed the documents;
8 is that correct?

9 MR. DRATEL: Yes, Your Honor.

10 THE COURT: Okay. I've received letters of
11 support and documents that are addressing the effect of
12 Mr. Albury's criminal activity. I just want counsel to know
13 that I have considered those submissions carefully. I'm
14 grateful for them.

15 And before addressing any objections, I want to
16 ask about these documents which are currently sealed. Under
17 Local Rule 49.1(c)(2), certain documents will be
18 automatically unsealed when judgment is entered unless I
19 order otherwise and these documents include letters that are
20 submitted in connection with the sentencing hearing.

21 Does either party move to keep these materials
22 sealed?

23 MR. DRATEL: Your Honor, with respect to some of
24 what we submitted, we submitted redacted versions that we
25 did post on ECF for personal identifying information, I

1 think which complies with other federal rules of procedure,
2 so that we do not disclose that publicly. So we have no
3 objection to those redacted versions being unsealed, but the
4 original underlying ones that have unredacted information
5 that we redacted for that reason, we would hope that those
6 would remain sealed.

7 THE COURT: Okay. I will grant that motion.
8 There may need to be further communication with counsel to
9 make sure that those individuals whose names you want to
10 remain undisclosed remain undisclosed.

11 MR. DRATEL: Thank you, Your Honor.

12 THE COURT: Do you wish to be heard, Counsel?

13 MR. DRATEL: Certainly, yes.

14 THE COURT: I'm just --

15 MR. MURPHY: No, we have no objection to that
16 process.

17 THE COURT: Okay. Very well.

18 MR. MURPHY: That's perfectly fine with --

19 THE COURT: And so we have one objection to the
20 Presentence Investigation Report and in particular
21 Mr. Albury objects to the Presentence Investigation Report's
22 application of an abuse of trust sentencing enhancement. At
23 this time I am happy to hear argument on the objection.
24 I've also considered the arguments of counsel as to that as
25 well.

1 MR. DRATEL: Thank you, Your Honor. Ms. Murray is
2 going to present the argument on the enhancement.

3 THE COURT: Thank you, Ms. Murray.

4 MS. MURRAY: Your Honor, the two-point enhancement
5 for abuse of trust under the guidelines does not apply if
6 it's already incorporated into the defendant's offense. We
7 submit that there are three ways in which Mr. Albury's
8 position of trust was and misuse of a position of trust was
9 already incorporated into his specific offense.

10 First of all, it was his position of trust through
11 his security clearance which granted him access to
12 classified material. And the Eighth Circuit has said that
13 one doesn't give the two-point enhancement simply where the
14 defendant's position of trust merely gave him access to
15 commit the crime.

16 Secondly, we argue --

17 THE COURT: What's the case you cite for that?

18 MS. MURRAY: *Claymore*, Your Honor, *United*
19 *States v. Claymore*.

20 Second, it's central to -- the finding that his
21 handling of classified information here was unauthorized,
22 that was central to a finding of guilt under 18 U.S.C.
23 793(e). And as Mr. Albury's factual allocution
24 acknowledged, it was only his security clearance that
25 granted him access to sensitive and classified information;

1 and what made his actions unauthorized was essentially his
2 misuse of that trust placed in him by virtue of the security
3 clearance. So in order to actually establish the element of
4 unauthorized, it was necessary that he essentially violate a
5 position of trust with respect to the security clearance and
6 so therefore our position is that the two points is
7 effectively baked into his offense level.

8 Third, we argue that his position of trust was
9 critical to a finding that his conduct was knowing and
10 willful, and this is very clear from his factual allocution
11 as well. The government needs to establish for a 793
12 conviction that the *mens rea* that the defendant committed
13 the act with is the knowledge that a willful communication
14 could be used to the injury of the United States.

15 And throughout the process of getting a security
16 clearance and the training that one gets in a security
17 clearance, one is advised that any release of classified
18 information could be expected to cause damage to the United
19 States.

20 So, in other words, again, the *mens rea* of this
21 offense, of Mr. Albury's offense, was baked into the concept
22 of him having a security clearance and the rules and
23 procedures of which he violated.

24 And this was actually specifically again in his
25 factual allocution in the plea agreement. It notes in that

1 factual allocution, which was drafted by the government, in
2 particular the defendant had been advised that unauthorized
3 disclosure of secret information reasonably could be
4 expected to cause serious damage to the national security of
5 the United States and that a violation of rules governing
6 the handling of classified information could result in
7 criminal prosecution.

8 And so this is the third reason, we submit, that
9 the two-point abuse of trust from the guidelines is
10 effectively baked into Mr. Albury's offense.

11 THE COURT: Thank you.

12 MS. MURRAY: Thank you.

13 THE COURT: Does the United States wish to be
14 heard?

15 MR. MURPHY: Your Honor, the parties here agree
16 that Mr. Albury held a position of trust. The parties agree
17 that he abused that trust. The only disagreement is to
18 whether that matters, and of course it does.

19 THE COURT: Well, whether it matters for
20 purposes --

21 MR. MURPHY: Whether it matters for --

22 THE COURT: -- of the sentencing guidelines.

23 MR. MURPHY: Absolutely. The courts that have
24 addressed this issue have found universally that it does.
25 The *Pitts* case involving an FBI agent, the *Ford* case

1 involving an NSA employee all upheld the enhancement.

2 The statute itself is clear that it applies to
3 whoever commits this crime, not whoever being a government
4 employee in a position of trust. There is another statute,
5 Title 5783, that directly addresses government employees in
6 one section and foreign officials or foreign agents in
7 another section. Here the statute is clear that it
8 addresses both.

9 And that's consistent with the statutory scheme.
10 794, the espionage statute, applies to both individuals who
11 hold or don't hold a position of trust. 793, the statute
12 here, applies to individuals who both hold and don't hold a
13 position of trust.

14 And the guidelines reflect that as well. 2M3.1 of
15 the espionage statute lays out the most severe guideline
16 penalties because of the intent level, and those guidelines
17 are driven by the classification of the information and not
18 any position. They don't bake in anything with respect to
19 volume of material. They don't bake in anything about
20 length of time of the crime. They only discuss the
21 classification level.

22 And that's the same for 2M3.1, 2M3.2, and 2M3.3,
23 which is the relevant statute here -- or relevant guideline
24 provision here. That provision only requires willful
25 transmission of materials, and willfulness is part of the

1 statute.

2 It does not matter for purposes of the guideline
3 itself if Mr. Albury were an employee in a position of trust
4 or if he were a clerk. If he came across the materials
5 however or if he abused that trust, that is the purpose of
6 the enhancement, because he abused the trust.

7 So the fact that there haven't been a lot of
8 prosecutions of people who do not occupy a position of trust
9 is reflective of the nature of the statute here in that we
10 don't often and we haven't had any prosecutions relating to
11 the people who are receiving the material and ultimately
12 publish it because of, A, strong policy considerations,
13 respect of the First Amendment, and lack of criminal intent.
14 We go after the people who have exhibited criminal intent,
15 such as Mr. Albury.

16 In instances where hypothetically someone could
17 provide information to a relative who then used it, that
18 relative, if they met the elements of the statute for
19 willfulness, could be prosecuted. They would be subject to
20 this guideline. They would not be subject to an
21 enhancement.

22 The enhancement is theoretically sound, legally
23 justified, and the facts compel its application here. Thank
24 you.

25 THE COURT: Is there anything further to address

1 as to this matter?

2 MS. MURRAY: Your Honor, I would just repeat that
3 the *mens rea* in Mr. Albury's case is satisfied very clearly
4 in the factual allocution with reference to his security
5 clearance, the training and advice he received with respect
6 to that.

7 And essentially the conclusion that because you
8 had a security clearance and because we told you in giving
9 it to you that any release would -- could potentially cause
10 danger or injury to the United States, that that is the
11 basis under which a *mens rea* was established in Mr. Albury's
12 case.

13 So we are not talking about other hypothetical
14 defendants. We're talking about Mr. Albury and how the
15 *mens rea* was established in his case, and it's very clear
16 from the factual allocution it was established by virtue of
17 his violation of the security clearance requirements given
18 to him as an FBI agent.

19 THE COURT: And what cases do you cite that are
20 the same, that are precedent for this very instance?

21 MS. MURRAY: Your Honor, we don't have a precedent
22 where somebody's security -- we do not have a precedent
23 where somebody's security clearance procedures was the basis
24 of the *mens rea* and therefore -- and they still got a
25 two-point abuse of trust. We just don't have a precedent.

1 THE COURT: Okay.

2 MS. MURRAY: Thank you.

3 MR. MURPHY: If I could respond to that point?

4 THE COURT: You may.

5 MR. MURPHY: With respect to the *mens rea* element
6 here, willfulness is all that matters because it's a
7 document case. The reason to believe could cause harm is a
8 higher intent standard that is in 2M3.2, Guideline 2M3.2.
9 Had we gone to trial, I'm confident we could have proven
10 that element and we may have been asking for that guideline
11 to be imposed here, but because this is a document case and
12 we reached a plea, we believe 2M3.3 is the appropriate
13 element.

14 And with respect to -- forget about hypothetical
15 cases. The government has brought cases against
16 noninsiders. The *Rosen* and *Weissman* case, which was
17 dismissed for completely different reasons, was brought.
18 They were not insiders. Had it gone to trial and they had
19 been convicted, there's no way they would have been subject
20 to that enhancement.

21 THE COURT: Thank you. So I'm prepared to make my
22 ruling at this point. Thank you, Counsel, for your
23 arguments.

24 Under Sentencing Guideline 2M3.3, the base offense
25 level for the offense that Mr. Albury has pleaded guilty to

1 is 24. The offense level reflects that Mr. Albury, without
2 authorization, transmitted national security information to
3 a person not authorized to receive it.

4 And the parties agree that the information was not
5 top secret, which distinguishes Mr. Albury's offense level
6 24 from the higher base offense level under this guideline,
7 which would be 29 for disclosure of top secret information.

8 The offense level distinctions in the guidelines'
9 subpart 2M3 generally reflect the classification of the
10 information gathered or transmitted and this classification
11 in turn reflects the importance of the information to
12 national security. The guideline does not distinguish
13 offense levels on the basis of the status or the
14 classification of the person who either disclosed or
15 received the information.

16 As to the abuse of trust adjustment under 3B1.1,
17 that distinguishes an offense based on the offender's role
18 or conduct in committing the offense. And for this
19 adjustment to apply, a position of public or private trust
20 must have contributed to in some way -- or in some
21 significant way to facilitating the commission or
22 concealment of the offense.

23 Now, the base level -- offense level therefore
24 takes into account the nature of the national security
25 information disclosed; whereas, the abuse of trust

1 adjustment considers the conduct of the offender who
2 leverages a position of abuse or -- I'm sorry, a position of
3 access or authority to the commission -- in the commission
4 of the crime.

5 And as I understand Mr. Albury's argument, it is
6 that the abuse of trust position -- the abuse of his
7 position of trust is so central to the crime that it is
8 included in the base offense level. I conclude that it is
9 not.

10 The base offense level for Mr. Albury's crime
11 reflects the nature of the information he disclosed and its
12 importance to national security. The abuse of trust
13 adjustment reflects that he used his position as an FBI
14 agent and his security clearance to facilitate the crime in
15 a significant way.

16 As noted in Mr. Albury's position paper, the
17 commission of this particular crime would not have been
18 possible without Mr. Albury's position as an FBI agent and
19 his security clearance. That is the very reason that the
20 abuse of trust adjustment is appropriate.

21 And so for these reasons Mr. Albury's objection to
22 the Presentence Investigation Report as to this matter is
23 overruled.

24 Are there other objections that need to be
25 addressed at this time?

1 MR. DRATEL: No, Your Honor.

2 MR. MURPHY: Nothing, Your Honor.

3 THE COURT: So I adopt as the findings of this
4 Court all of the factual statements in the Presentence
5 Investigation Report to which there has been no objection.

6 Now, is the government, Mr. Murphy, moving for an
7 additional one-level reduction in the offense level for
8 acceptance of responsibility under Section 3E1.1(b) of the
9 guidelines?

10 MR. MURPHY: That is correct, Your Honor. A
11 timely plea was entered and we are satisfied with that.

12 THE COURT: Thank you. That motion is granted,
13 then.

14 And based on my rulings and that motion, I
15 determine the guidelines calculations as follows: The total
16 offense level is 23. The Criminal History Category is I.
17 The imprisonment range is 46 to 57 months, a supervised
18 release range of one to three years, a fine range of 20,000
19 to 200,000 dollars, and a special assessment of \$200.

20 Does either the United States or Mr. Albury have
21 any corrections or objections to my guidelines calculations
22 in light of the findings and rulings that I've made so far?

23 MR. MURPHY: No, Your Honor.

24 MR. DRATEL: No, Your Honor.

25 THE COURT: Very well. And also am I correct that

1 neither the United States nor the defendant has moved for a
2 departure under the sentencing guidelines? Is that correct?

3 MR. MURPHY: That's correct, Your Honor.

4 MR. DRATEL: Your Honor, we haven't moved for a
5 departure because we believe that to the extent that they
6 constitute departures, they also constitute factors that the
7 Court would weigh within 3553(a) as a whole.

8 THE COURT: Okay. Very well. So then let's move
9 into the allocution phase of this hearing. Mr. Dratel, you
10 or your co-counsel may make your arguments in favor of a
11 variance at this time and say anything else on behalf of
12 Mr. Albury.

13 MR. DRATEL: Certainly, Your Honor. Thank you.
14 May I use the podium?

15 THE COURT: Yes, please.

16 MR. DRATEL: It's easier for me to follow my
17 notes.

18 THE COURT: And it is adjustable. You can move
19 the platform up and down, if you need to, as well as
20 adjusting the mikes.

21 MR. DRATEL: I think that's okay. Maybe a year
22 from now I will need it closer. Thank you, Your Honor.

23 I won't, obviously, go into the depth of our
24 written submissions because I know the Court has considered
25 them.

1 THE COURT: I have.

2 MR. DRATEL: And we appreciate that. I just want
3 to touch on some of what we consider the important aspects
4 of sentencing here for Mr. Albury.

5 Being an FBI agent was Mr. Albury's career, his
6 only job, even starting in college. He was decorated,
7 dedicated, believed in his work. This in many respects
8 makes this a tragic case for him in the context of what he
9 has given up and what he has lost as a result of his
10 conduct.

11 He's not a contractor who was on the job for a
12 couple of months. This was his professional life in its
13 entirety. Yet he faced conflicts between his daily
14 professional role and his personal internal understanding of
15 what was happening in his job and at the Bureau as a whole
16 in terms of an approach.

17 And I would ask the Court to consider for someone
18 so committed to his work and the only culture and
19 professional position that he knew, to consider the level,
20 the pervasiveness, and the persistence of what he found
21 wrong that led him to do this, that led him to give all that
22 up, that motivated him for the offense conduct.

23 Because there's no other motive for the offense
24 conduct and the government hasn't been able and can't
25 provide anything different in the sense that it's not about

1 money, it's not about career advancement. It's really about
2 career ending. It's not about harm of any kind. It's not
3 about anything other than what he perceived to be important
4 in the public interest, and in that context as well the
5 government hasn't identified an articulated harm.

6 This separates this case from so many of the other
7 cases in which the government has identified, and we have
8 put many of them in our papers, but where the government
9 identifies a specific harm. Here there's nothing like that.
10 What you have in the submission from the government is
11 really a hypothetical and a generality that doesn't provide
12 anything like you do -- like courts had in other cases.

13 And the issues that he was concerned about are
14 issues that others were concerned about. Even the director
15 of the FBI was concerned about these issues. And it's
16 unfortunate that it still goes on and -- but he felt
17 compelled to, again, lose everything that he had worked for
18 for 20 years almost.

19 THE COURT: Articulate for me those issues of
20 concern that you're addressing. I want to make sure that
21 I'm following your allocution and it is as effective --

22 MR. DRATEL: Sure.

23 THE COURT: -- as you want it to be.

24 MR. DRATEL: Okay.

25 THE COURT: So I would like you to be specific so

1 I have a better understanding and I have better insight.

2 MR. DRATEL: Sure.

3 THE COURT: I think you can provide that.

4 MR. DRATEL: Sure. There are two aspects and I
5 think that they intertwine given Mr. Albury's own personal
6 situation.

7 One is the broader counter-terrorism program that
8 targets certain communities, particularly here in
9 Minneapolis a Muslim community, but also at the same time
10 the black community.

11 And for him in the FBI to endure from the start,
12 even from the academy, and Dr. Sachs' report I think is
13 important in this respect, even from his time at the academy
14 racial animus that he repressed, suppressed, endured for a
15 considerable period of time and that -- those things were
16 going on at the same time.

17 So on the one hand you have this policy, a program
18 that is targeting communities in a way that Mr. Albury felt
19 was alienating, not effective. He wrote the white paper.
20 His own white paper is a reflection of his disagreement with
21 that policy. And at the same time also a very, very
22 personal element to it as to what he experienced as an
23 isolated African-American FBI agent.

24 And I don't think -- obviously the isolation had
25 its own impact. Dr. Sachs' report, I think, is instructive

1 in that regard too. And it's a corrosive factor, I think
2 the isolation as well, and those aspects come together very
3 toxic in this community where you have not only Muslims who
4 are black, but also foreign and all of that together was for
5 Mr. Albury just intolerable.

6 The work that he was doing, the work that his
7 colleagues were doing, the attitudes that his colleagues had
8 towards the people in the community did not help the
9 situation.

10 And ultimately his ultimate conclusion is that
11 this is counterproductive for the program that we're trying
12 to implement, which is twofold. One is to protect the
13 community, but the other is also to enlist the community in
14 a cooperative venture with law enforcement. That second one
15 certainly was completely undermined by the program, and
16 that's what Mr. Albury saw and that's what he reflected on
17 in his white paper.

18 So both of those, I think, are important and
19 unfortunately with respect to the racial issue, it followed
20 him his whole career. Like I said, it started at the
21 academy and it followed him his whole career. And I think
22 that they dovetailed in a way that compelled him to this
23 conduct.

24 And looking at Dr. Sachs' report, also -- and also
25 he attempted to reconcile all this. He attempted to find a

1 better way. He went to Iraq. He moved from San Jose to
2 Minneapolis. I think he's -- my own interpretation. He is
3 sort of running, but he's not necessarily running away from
4 it, he's running sort of further into it.

5 And the white paper, again, was a good idea and he
6 was discouraged by what he continually saw, that he wouldn't
7 get anywhere, so he abandoned that.

8 I think the counseling that he has received since
9 this case, since the search of his house back in August of
10 '17, I think that has been extraordinarily helpful to him
11 and effective in getting him to acknowledge these things in
12 a more productive way and acknowledge sort of the impact
13 that they had on him, on his personal life, on his
14 disposition, all sorts of things that holding all that
15 inside does to a person.

16 And in terms of his career, the punishment here is
17 not just what the Court will sentence him to. It's ongoing.
18 He has lost his career. He is not a lawyer who after seven
19 years can come back and petition the bar for reinstatement.
20 He is not a politician who can run again after a conviction.
21 He is not an athlete who can resume the profession, a very
22 lucrative profession. He is not in that category. This is
23 it. He's not going to be able to pursue this anymore.

24 And in the context of obviously specific
25 deterrence, that resolves that. He's never going to be in a

1 position to have a security clearance, to be in law
2 enforcement, to do any of the work that he dedicated himself
3 exclusively. This is it. He doesn't come from another
4 discipline. This is his discipline.

5 And so the nature of not only in the context of
6 the professional part of it, the reputational part of it,
7 but the fact that he built up a career that was outstanding
8 and now, in the context of the law enforcement community, it
9 has no meaning, it's all gone, and he'll never get that
10 back.

11 So the punishment here in terms of collateral
12 consequences, I think, is actually far more significant than
13 many others who can resume careers, who for -- there is an
14 interregnum and then they are back, you know, they have an
15 opportunity. This is permanent.

16 I think it's also important because I know the
17 government placed a lot of emphasis and I know that courts
18 and the statute talks about general deterrence.
19 Philosophically there are a lot of issues that one could
20 raise with general deterrence, but it's not even necessary
21 here because in this -- the landscape of these cases is so
22 chaotic and inconsistent and inequitable that there is no
23 standard and that there is no message that can be sent by a
24 single case that could affect it.

25 The system is completely -- this system of

1 unauthorized disclosure and punishment and even prosecution
2 and even investigation is so unhinged from the standards
3 that we encounter as practitioners in sentencing on a daily
4 basis, that general deterrence will not -- it can't be
5 achieved in this case.

6 He's not General Petraeus, but the next person who
7 is -- maybe it will be a friend of the President and get
8 pardoned. Maybe it will be a powerful government or law
9 enforcement official who won't get prosecuted even. Maybe
10 it will be someone for whom leniency or extremely harsh
11 punishment serves the political purpose in a political
12 context so that they become a pawn in some other game that's
13 being played.

14 Because right now there is no message to send with
15 this case, and they're not Terry Albury. He's the only
16 Terry Albury. He's the only person being sentenced today.
17 He's the only person being punished today.

18 I think in terms of the statute and the way that
19 the statute is structured, in the context of general
20 deterrence, if you have two sentences, if you have two
21 possible sentences, one harsher than the other, and if the
22 court cannot reliably, relying on empirical evidence, which
23 again doesn't exist, anecdotal evidence, which really
24 doesn't exist either, but if the court cannot reliably say
25 the harsher sentence will achieve general deterrence, then

1 the court has to impose the more lenient sentence. That's
2 the law. That's justice. That's fairness.

3 There's a place for compassion at sentencing and
4 Mr. Albury deserves it for his career, for his life, as a
5 human being. I think that's all encompassed within the
6 driving clause of sentencing, which is sufficient, but not
7 greater than necessary.

8 And sentencings are obviously about the past,
9 about offense conduct, but I think they are also a lot about
10 the future, the future for the defendant, the future for the
11 community.

12 What does prison serve in that regard? Nothing
13 for Mr. Albury. I don't think anybody in the room or
14 anybody who has ever met him is concerned about his future
15 and that prison is somehow needed to incapacitate him or to
16 punish him.

17 And I've been doing these for almost 40 years,
18 sentences, and my impressions are that in the context of
19 trying to achieve general deterrence, something like that,
20 and even with respect to some of the other issues, that
21 sentences are like footprints in the sand and when the next
22 wave rolls in, they are erased and no one sees them anymore.
23 The only impact this will have is on Mr. Albury and his
24 family.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 Now -- actually, Mr. Albury, before I impose your
3 sentence, you do have the right to address the Court as
4 well. Is there anything you would like to say on your own
5 behalf?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: You may come forward to the podium.

8 THE DEFENDANT: Good morning, Your Honor.

9 THE COURT: Good morning.

10 THE DEFENDANT: Thank you for the opportunity to
11 address this Court.

12 (Pause)

13 THE COURT: Take your time.

14 THE DEFENDANT: Fresh out of college in 2001 I
15 joined the FBI with a sincere desire to serve, protect, and
16 make this world a better place. The FBI represented the
17 best of America, strict adherence to the Constitution,
18 coupled with fairness for those that served.

19 During my 16-plus years in the Bureau, I probably
20 served along dedicated and patriotic men and women motivated
21 by the shared call of ensuring liberty and justice for all.
22 As I grew more experienced and particularly as I worked in
23 the counter-terrorism context, it was impossible to ignore
24 and minimize the detrimental aspects certain FBI policies
25 and procedures had on this country's broader national

1 security. As a result, I sought to address these concerns
2 outside established channels.

3 Time and separation from the FBI, along with
4 counseling, has given me a perspective I never had. I now
5 recognize there were other avenues and wish I had trusted
6 the FBI's internal process for resolving my concerns.

7 I fully accept responsibility for everything I
8 did. This case has been devastating for my family and me.
9 I sincerely apologize to everyone I have hurt as a result of
10 my conduct, especially my family. My utmost apologies to my
11 former colleagues in California and Minnesota and the larger
12 law enforcement community. I truly wanted to make a
13 difference and never intended to put anyone in danger.

14 Thank you.

15 THE COURT: Thank you, Mr. Albury.

16 Mr. Murphy.

17 MR. MURPHY: Your Honor, I would like to just
18 address several of the points that counsel made that I think
19 warrant being addressed.

20 He mentioned the Petraeus case. That case was a
21 misdemeanor. The disclosures, to the extent there were
22 disclosures in that case, were to someone with a security
23 clearance. That's why that case was not charged as a
24 disclosure case. It was a misdemeanor case. That is why it
25 received misdemeanor treatment.

1 The assertion that cases get prosecuted for
2 political reasons is vastly incorrect and mildly offensive.
3 I have been doing these cases, leak cases, for ten years and
4 we go where the facts take us and we prosecute those who can
5 be prosecuted. They are difficult cases, but I have never
6 once been politically pressured to go somewhere the facts
7 didn't warrant. And that's all I want to say on that point.

8 With respect to the fact that Mr. Albury had a
9 long career, I think it bears noting that 10 percent of that
10 time was spent committing felonies, 10 percent of his career
11 was the course of conduct, which was only interrupted by
12 virtue of the FBI's investigation, an investigation they
13 didn't want to have to do.

14 With respect to the conflicts that Mr. Albury
15 felt, I have no doubt that they were genuine, but he could
16 have worked within the system, he could have left the
17 system. Instead he chose to commit crimes and he continued
18 to over an 18-month span.

19 The principles that he is concerned about, defense
20 counsel himself stated that the head of the FBI himself
21 agrees with those principles. These are not -- it's not in
22 dissonance with what the FBI is seeking to do.

23 He did not disclose any waste, fraud, or abuse.
24 He just recklessly, willfully, and criminally put
25 information in the public domain and, in addition, took

1 additional information home that would have been in the
2 public domain had we not interrupted him. That additional
3 information completely shatters any concept of whistleblower
4 in this case.

5 The defense has been referring in their papers to
6 every single leak prosecution as a whistleblower case. They
7 are manifestly not. We prosecute the cases that warrant
8 prosecution.

9 With respect to the fact that he's sought
10 counseling and there's some, in their papers, reference to
11 medical jargon and analyses of issues he's faced, again, all
12 I can say on that is he could have left the FBI at any time.

13 This is a gentleman who if he was, in fact, having
14 such mental issues while he was working, this is a man who
15 loaded his weapon and carried it to work every day. He
16 should have walked away. He owed it to everyone to walk
17 away. Instead he did not and he chose to commit crimes.

18 With respect to general deterrence and the scope
19 of cases that involve 11(c)(1)(C) pleas, often the
20 government resolves cases on those grounds because of the
21 information involved and the fact that we do not want to
22 cause additional harm through a prosecution.

23 That is a major problem with these cases that the
24 government has to face. We have to weigh exposure of
25 additional or confirmation of intelligence equities that are

1 out in the world versus seeking justice.

2 Sometimes, like in this case, we have so much
3 criminal conduct to choose from that the government could
4 have gone to trial very easily. Sometimes the nature of the
5 information, the nature of the sources at risk is such that
6 the government has to take what it can get.

7 The assertion that the government has identified
8 specific harms in other cases I take a little bit of issue
9 with because we have not -- that is why we do these cases
10 the way we do them. We are not identifying specific harms.
11 We are not confirming particular sources and methods.
12 Sometimes we have to when cases go to trial, which they
13 rarely do. Sometimes we have to as cases proceed.

14 But the government -- the reason we submitted the
15 declaration of Assistant Director Priestap is because the
16 harm is associated with the nature of the materials and the
17 classification system that is laid out in executive orders
18 that is followed by intelligence professionals addresses the
19 type of harm that reasonably could be associated with the
20 disclosures, and that is the sort of training Mr. Albury
21 had. That is why, had we gone to trial, we probably could
22 have shown an additional intent level.

23 But I want to take out the notion that other cases
24 involved dramatic harm and this one involved nothing. This
25 case involved -- even the materials that weren't disclosed,

1 the multiple victim agencies, and there were multiple
2 agencies, had to take steps.

3 He put materials on his laptop. That laptop was
4 accessible by the Internet. That information could be
5 anywhere. They have to act as though it is. They have to
6 take defensive measures. Their programs that are in place
7 have to be readdressed, have to be revamped. This takes
8 people away from doing their job of protecting us.

9 The defense doesn't even really address the
10 retention aspect of this crime and they sort of pass over it
11 in their papers, but it is a continuing course of conduct.
12 Those materials would have been placed, and to believe they
13 would not have been is impossible. They would have gone out
14 the door, they would be on the Internet, and then we would
15 be in an even worse posture from a larger governmental
16 perspective in addressing the problems. But they're bad
17 enough as is and that's why retention cases themselves get
18 real sentences.

19 So the deterrence effect here I think is very
20 important. I think it's very important to send a guideline
21 message to people that if the government has the opportunity
22 in a case where you are doing criminal activity to actually
23 charge you and bring you to justice, you will face an
24 appropriate sentence and the government need not always take
25 a substantial haircut just because your crime is that bad.

1 That's all I have.

2 THE COURT: Thank you.

3 MR. DRATEL: May I respond just briefly, Your
4 Honor?

5 THE COURT: You may.

6 MR. DRATEL: Thank you. I think the government
7 has undermined its own general deterrence argument because
8 in some respects it sounds like what the government is
9 saying is when its hand is forced by more important or more
10 sensitive information, it has to give lower sentences. So
11 in that context, what is general deterrence in that regard?

12 The other part is the government wants the Court
13 to sentence Mr. Albury on the basis of something that never
14 happened, which is dissemination of the retained documents.
15 The government wants the Court to essentially sentence him
16 on a hypothetical.

17 Some of those documents he had for four or five
18 months. We don't know what would have happened. I'm not
19 saying one way or the other, but I'm saying that none of
20 them were disseminated and he had some of them from April
21 and May, for three to four months.

22 So I think it would not be appropriate to -- I
23 think the government's argument is inappropriate in the
24 sense that the crime is the crime, not something that never
25 happened.

1 Thank you.

2 THE COURT: Do the guidelines themselves, however,
3 address the issue of the offense that was committed in this
4 case?

5 MR. DRATEL: Retention has -- yeah, so in that
6 sense it's incorporated within the guideline. There's no
7 other aspect of it that should enhance or increase the
8 sentence in any way. But what I'm saying is that in the
9 context of what the government wants the Court to consider
10 is something that simply did not happen.

11 THE COURT: Okay.

12 MR. DRATEL: Thank you, Your Honor.

13 MR. MURPHY: Your Honor, if I could address that
14 last point?

15 THE COURT: You may.

16 MR. MURPHY: Something that did not happen did
17 happen. He took the documents home, willfully retained
18 them. That itself is a felony. If they want to treat that
19 as an entirely separate crime that does not matter, that is
20 wholly inappropriate. It is all part of one or continuing
21 course of conduct.

22 Not only did he take the documents home, he had
23 the reporter's phone number attached to them, the same
24 reporter to whom he disclosed information previously. So
25 they were going to go.

1 But if we are going to treat it as a completely
2 separate offense, then we should be talking about how they
3 don't group and they should be sentenced differently. There
4 would be, I believe, another two levels associated if it
5 were a completely different crime.

6 So I do not understand the defense ignoring the
7 facts of this case, especially in connection with a guilty
8 plea. I do not think ignoring the facts helps them and it
9 completely undermines, within the 3553 factors, true
10 acceptance.

11 So if there are any other questions from the
12 Court, I would be happy to address them, but I think I've
13 had my say.

14 THE COURT: Very well.

15 (Pause)

16 THE COURT: Mr. Albury and your counsel, please
17 come forward. I am prepared to render a sentence in this
18 matter.

19 I have carefully reviewed the Presentence
20 Investigation Report and the addendum to the report. I'm
21 now prepared to impose the sentence. I've listened
22 carefully to the arguments that have been made here today.
23 I have thoroughly reviewed the position papers of the
24 parties, the briefing of the parties, and I've reviewed the
25 documents that are the subject of this crime.

1 And it is the judgment of the Court that you,
2 Terry J. Albury, are sentenced to prison for a term of
3 48 months.

4 No fine is imposed.

5 You must pay a special assessment in the amount of
6 \$200 to the United States and that is due immediately.

7 You're ordered to serve a term of supervised
8 release and on release from your imprisonment, that
9 supervised release term will be three years. While on
10 supervised release you must comply with the following
11 conditions:

12 You must comply with the mandatory conditions of
13 supervised release that's described in Section 5D1.3(a) of
14 the United States Sentencing Guidelines and these conditions
15 include:

16 That you must not commit any crimes, federal,
17 state, or local.

18 You must not unlawfully possess a controlled
19 substance. You must refrain from any unlawful use of a
20 controlled substance. You must submit to one drug test
21 within 15 days after your release from imprisonment and at
22 least two periodic drug tests thereafter as determined by
23 your probation officer.

24 You must cooperate in the collection of a DNA
25 sample as directed by Probation.

1 You also must comply with the standard conditions
2 of supervised release described in Section 5D1.3(c) of the
3 sentencing guidelines. These conditions include:

4 That you must report to the nearest United States
5 Probation and Pretrial Services Office within 78 [sic] hours
6 after your release from prison, unless the probation officer
7 instructs you otherwise.

8 You must not possess a firearm, ammunition,
9 destructive device, or any other dangerous weapon.

10 You're also ordered to abide by the following
11 special conditions of your supervised release:

12 You must abstain from the use of alcohol and other
13 intoxicants and not frequent establishments whose primary
14 business is the sale of alcoholic beverages.

15 You must submit to substance abuse testing as
16 approved and directed by your probation officer.

17 You must participate in psychological or
18 psychiatric counseling or treatment program as approved by
19 your probation officer. Further, you must contribute to the
20 costs of that treatment as determined by the Probation
21 Office Co-Payment Program, not to exceed the total cost of
22 treatment.

23 And I direct that the Probation Office furnish you
24 a written statement of all of the conditions of your
25 supervised release.

1 At this time I'll ask, Mr. Dratel, if there is a
2 particular location of incarceration that you wish to
3 request.

4 MR. DRATEL: May we get back to the Court within a
5 couple of days in writing on that? Just because now we have
6 a better idea of what's -- what the amount is and all of
7 that.

8 THE COURT: Yes, you may.

9 MR. DRATEL: Thank you, Your Honor.

10 THE COURT: I want to explain the reasons now for
11 the sentence that I have imposed.

12 Having considered all of the Section 3553(a)
13 factors, I find that the sentence that I've imposed is
14 sufficient, but it's not greater than necessary to reflect
15 the seriousness of Mr. Albury's offense and to provide just
16 punishment for that crime, to deter Mr. Albury from
17 committing crimes in the future, to deter others from
18 committing this crime or similar crimes in the future, to
19 protect the public, to provide Mr. Albury with needed
20 treatment and counseling, and to avoid unwarranted
21 disparities between Mr. Albury's sentence and the sentences
22 of defendants who have similar records who have been found
23 guilty of similar conduct.

24 I have sentenced Mr. Albury to 48 months in prison
25 and this sentence in my judgment is appropriately tailored

1 to the facts and the circumstances here.

2 Mr. Albury, over a period of 18 months you used
3 your position as an FBI agent and your security clearance to
4 collect sensitive information related to national security,
5 which you later released to a reporter. You did so
6 knowingly. You did so willfully. You knew what you were
7 doing was a criminal act and you knew that you were putting
8 the nation's security at risk.

9 Let no one be mistaken this is a very serious
10 offense. Although your crime may not bring any identifiable
11 victims here into the courtroom today, we cannot ignore the
12 purpose of our vast security -- national security
13 infrastructure. That is to protect and defend the United
14 States. And you put that infrastructure at risk. You put
15 the United States at risk.

16 Now, it may be in your mind that it was a minimal
17 risk or it may be in your mind a just calculation of risk.
18 That's your judgment. The law stands in judgment of the
19 acts that you committed.

20 I am mindful of the circumstances surrounding your
21 career in the FBI and what may have motivated your criminal
22 conduct. I think that's an important consideration. I'm
23 not blind to the racism that exists in our society. It has
24 been in the making for over hundreds of years and as valiant
25 as the efforts are to eliminate it, I dare say it will be a

1 part of our future for quite some time.

2 I'm not blind to what it means to be a discrete
3 and insular minority, particularly in a professional
4 environment, but those conditions, they didn't require you
5 to commit a crime and in my view they are not a valid excuse
6 for doing so.

7 You had other options, but you chose the one that
8 you chose. It brings you here into this courtroom today.
9 In fact, in light of your exemplary record, you very well
10 may have squandered the opportunity to shed light on
11 conditions that concerned you in a manner that could have
12 resulted in a productive response. You chose a different
13 path and that path leads you right here.

14 I have reviewed your personal history, your
15 family's history, and your personal experiences that have
16 instilled strong convictions in you, your college
17 experience, your experience excelling in school before
18 college, the investment of people in the community in you,
19 the hopes and dreams that you took not only to college, but
20 into society, into law enforcement with the hopes and dreams
21 of people who have known oppression, who have known
22 brutality, and who thought your presence would shape law
23 enforcement in a way that could help change policy, help
24 bring about the sustained justice and safety that so many
25 members of our community, regardless of race, hope for.

1 And at some point, and maybe still, you perceived
2 your actions to be honorable. Maybe that was your
3 motivation, but it is a misguided understanding of honor.
4 It put our country at risk.

5 Honor is shown even in the midst of this
6 devastating circumstance, however, by your acceptance of
7 responsibility for this offense immediately upon its
8 discovery. You admit your wrongdoing now and the danger to
9 which you exposed your country, our country, your family's
10 country, your children's country.

11 Your conduct was not motivated by greed and you
12 have indicated that you were motivated by sincere moral
13 conflict. The moral conflict is not one that you're being
14 judged on today. It's not what the sentence represents a
15 response to. It's not the conflict. It's the exercise of
16 bad judgment and criminal activity in response, and that
17 cannot be tolerated.

18 The United States' security cannot be put at risk
19 for that purpose and it's hard for me to believe that you,
20 with your intelligence, your training in law enforcement,
21 your experience as an FBI agent, that you didn't understand
22 the risk that you were taking in putting the United States
23 in harm's way by acting in the manner that you did, in your
24 mind for a noble cause and a just action, in the minds of
25 those who understand national security a fool's errand, one

1 that you went on I believe with sincere hopes of doing the
2 right thing, but a real, real misguided understanding of
3 justice and a misguided exercise of judgment. You knew
4 better then.

5 It's not too late for you to move forward with
6 your life, certainly without the opportunity to serve, as
7 you so proudly served at one point in your career, certainly
8 not as a person that can be trusted and entrusted with the
9 nation's security or the security of American people or any
10 of our institutions because of the judgment that you
11 exercised and have displayed.

12 It's too late to undo the damage from the
13 decisions you made. It's not too late to move forward with
14 an understanding of the wrongdoing, with the understanding
15 of the implications, and perhaps with a more productive
16 effort to right the wrongs that you identified in terms of
17 racism and perhaps with the wrongs that you identified in
18 selective punishment.

19 It's up to you to decide whether that is your
20 mission that you wish to address in a lawful manner. No one
21 will make you. Frankly, no one will blame you for saying
22 enough.

23 But let it be clear that we are a nation of laws.
24 We challenge unjust laws in places like this, United States
25 courts. We do so with the laws that exist in the United

1 States and the Constitution. We do not do so in the manner
2 in which you did or you thought you did and not, first of
3 all, place America in harm's way and, secondly, creating an
4 example that is not one that should be followed.

5 You've been a role model and, frankly, you can
6 still be a role model with the proper understanding and
7 rehabilitation for the crimes that you have committed, but
8 that's you -- that's on you. It's your decision. That's
9 not a part of your sentence. You will be punished for the
10 acts that you committed. What you decide to do with the
11 lessons learned and how you affect society in the future
12 will be your decision.

13 You can do good in this world again, but it will
14 be your decision whether that's a commitment you want to
15 make. And no one is going to blame you if that's not what
16 you want to do, but it certainly may be the opportunity to
17 think about some type of redress that may impact others
18 facing similar challenges and who are thinking about
19 committing the same mistakes that you have committed,
20 helping them understand the nature of those mistakes and
21 helping them understand why a different path would be a
22 better one.

23 The materials that I have read about you describe
24 you as a man of character. You have skills, you have
25 talent, you have personality traits that make you an asset

1 to your family that can help you replenish your worth to
2 this community. I believe that you have them. I would not
3 mention them now if I didn't believe that they exist. And
4 they have not been destroyed and they aren't diminished by
5 the actions that you have taken.

6 I encourage you to maintain and develop your
7 abilities both during the time you spend in prison and the
8 time after your release. There will be opportunities
9 available to you while serving your sentence. Given your
10 professional and personal background, I'm confident that
11 you'll take advantage of those opportunities. And certainly
12 upon your release there will be opportunities as well, but
13 it's up to you. That's not a part of your sentence. That's
14 how you decide to move forward and it's a very personal
15 decision, one that you make with your family, one that helps
16 make you whole. We don't have enough people to squander,
17 people of your talent, people of your intellect, so I hope
18 that you use those skills in a productive way going forward.

19 I have imposed a three-year term of supervised
20 release to monitor and to support your transition back to
21 the community.

22 I want you to understand you have the right to
23 appeal your conviction if you believe your guilty plea was
24 unlawful or invalid. And in general a defendant has the
25 right to appeal his sentence, but as part of your plea

1 agreement you gave up your right to appeal the length of
2 your sentence as I have imposed it.

3 And courts usually enforce this type of waiver,
4 but if you believe that regardless of your plea agreement
5 you still have the right to appeal your sentence, you should
6 do so and you should make your arguments to the United
7 States Court of Appeals for the Eighth Circuit.

8 Now, if you wish to appeal your conviction, your
9 sentence or both, you must file a Notice of Appeal within
10 14 days after the entry of the judgment of conviction in
11 this case.

12 If you cannot afford to pay the costs of an
13 appeal, you can ask for permission to be excused from paying
14 those costs and if you make that request, the Clerk of Court
15 will file a Notice of Appeal on your behalf.

16 The Presentence Investigation Report will be kept
17 in the Court's files under seal and if an appeal is filed,
18 the report will be delivered to the United States Court of
19 Appeals for the Eighth Circuit.

20 Mr. Albury is not currently in custody and the
21 Mandatory Detention Act does not apply.

22 Mr. Albury, you must self-surrender to the United
23 States Marshal Service at 10:00 a.m. on November 8, 2018.
24 And the conditions of your release that have previously been
25 ordered remain in effect.

1 Counsel, is there anything further that the Court
2 needs to address in this matter at this time?

3 MR. DRATEL: Yes, Your Honor. We would ask that
4 Mr. Albury's surrender be postponed until he's designated.
5 It makes a difference in terms of classification.

6 THE COURT: I didn't --

7 MR. DRATEL: Sorry. We would ask that
8 Mr. Albury's surrender be deferred until he is actually
9 designated by the Bureau of Prisons. It makes a big
10 difference in terms of placement and classification.
11 Self-surrender to a designated facility is an important
12 aspect of this, so we would ask that he be -- that process
13 in my experience is between 45 and 60 days. So I would ask
14 that it be at the time of designation, you know, that we
15 could work that out with the Bureau of Prisons and do that.

16 THE COURT: I am going to ask if the United
17 States -- Mr. Murphy, do you wish to be heard on that
18 matter?

19 MR. MURPHY: Your Honor, we do not have a position
20 on this.

21 THE COURT: Then that motion is granted and it is
22 so ordered. I do need to have a self-surrender date at some
23 point and so I will consult with counsel to make the
24 determination as to when that self-surrender date is --

25 MR. DRATEL: Yes.

1 THE COURT: -- and how to make sure that a court
2 order reflects that so that we are sure that there is ample
3 notice for Mr. Albury and so that his rights are preserved
4 and so that there aren't any questions of due process should
5 there be a failure to appear.

6 MR. DRATEL: Your Honor, what we'll do is when we
7 send you the letter with respect to designation, we'll set
8 forth a schedule that we think makes sense based on
9 experience with the Bureau of Prisons.

10 THE COURT: Very well. And I will then at that
11 point set a date and time by order.

12 MR. DRATEL: Thank you, Your Honor.

13 THE COURT: Is there anything further, Counsel,
14 that the Court needs to address in this matter at this time?

15 MR. DRATEL: No, Your Honor.

16 MS. MURRAY: No, Your Honor.

17 MR. MURPHY: No, Your Honor.

18 THE COURT: Mr. Albury, good luck to you.

19 (Court adjourned at 12:29 p.m.)

20 * * *

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/ Lori A. Simpson

Lori A. Simpson, RMR-CRR